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No. 99-1994

IN THE
Supreme Court of the United States

STATE OF NEVADA; WILLIAM MOLINI; RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,
Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; JOSEPH VAN WALRAVEN, HON.,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

A. Nevada's Immunity From Suit Precludes Tribal Claims Against State Officials In Tribal Court.

Petitioners showed in their opening brief (Pet'r Br. 9-13) that all States, Nevada included, entered the Union with their sovereignty intact. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). One component of that sovereignty is that a State generally has authority to decide when and where the government and its officials will be sued save when the Constitution delegates to another sovereign the authority to abrogate those immunity rules. *Alden v. Maine*, 527 U.S. 706 (1999). In this instance, Nevada has granted carefully-delimited waivers of immunity for official conduct of state employees. By their terms, however, these waivers do not extend to Mr. Hicks' tribal-court claims brought under tribal law.

In trying to evade these immunity requirements, Mr. Hicks has not pointed to any cognizable source of authority for preempting, abrogating or otherwise nullifying what Nevada law requires. Nor is it inherent in the Tribes' status as domestic dependent nations. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). To the contrary, any exercise of judicial power over state officials is inconsistent with the dependent status of Tribes, and accordingly any such power—if it ever existed—was divested by the plan of the convention. Therefore, in the absence of any showing that Nevada has either consented to suit in tribal court, or that Congress has abrogated state immunity by a clear statement and in accordance with a permissible exercise of constitutional authority, the State's immunity rules bar tribal jurisdiction over Mr. Hicks' tribal law claims.

Mr. Hicks does not argue that Nevada has consented to suit in tribal court. And he does not argue that Congress has properly invoked the Indian Commerce Clause or any other

source of constitutional authority to preempt Nevada's immunity rules regarding claims against the government or its officials. Instead he and the tribal respondents principally criticize the Framers' understanding of State sovereignty as well as the principle of State sovereignty itself, then weave together a claim that federal policy in this area has evolved to supersede these original understandings regarding the allocation of power among the United States, the individual States, and the Indian Tribes. *See, e.g.*, Hicks Br. at 31-37, Brief *Amici Curiae* of Confederated Tribes of the Colville Reservation, et al., at 17-21; Brief *Amici Curiae* of the Pyramid Lake Paiute Tribe of Nevada, et al., at 10-14.

Arguments of this sort, however, explain why sovereign immunity is a constitutional doctrine, supplying it with the "starch" it needs to resist momentary changes in public opinion. *Cf. Denver Area Educ. Tel. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring). "[S]tate sovereign immunity, unlike foreign sovereign immunity, is a *constitutional* doctrine that is meant to be both immutable by Congress and resistant to trends." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2231 n.4 (1999). Trends in federal Indian policy thus cannot affect state immunities in tribal courts, just as they cannot alter federal immunities in tribal court. Short of a permissible abrogation of state immunity, modern statutory policies regarding Indian Tribes do not inform the meaning of state immunity; only the terms of the Constitution (and the original understanding of it) may do that.

Instead of advancing their position, respondents' oblique criticism of the Framers' vantage point ultimately confirms the implausibility that the Constitution envisioned tribal court actions against state officials. The founders, in point of fact, never contemplated tribal involvement in any court, much less tribal courts. *See, e.g., Cherokee Nation v. Georgia*, 30 U.S. 1, 18 (1831); *Oliphant v. Suquamish Indian Tribe*, 435 U.S.

191, 196-97 (1978). *See generally Documents of United States Indian Policy* (Francis Paul Prucha ed., 3d ed. 2000) ("Prucha").[1]

Time of course has a way of making these early views, and others that are even less charitable,[2] seem hard to fathom today. And of course the State's reference to this shared understanding of the meaning of the Constitution is not meant to signal a modern-day endorsement of these views. But the

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[1] *See, e.g.*, Prucha, at 31 (Statement to the House of Representatives submitted by Secretary of War Calhoun on December 5, 1818) (Eventually Indian Tribes will "be permitted to participate in such civil and political rights as the respective States within whose limits they are situated might safely extend to them"); *id.* at 47 (first annual message to Congress by President Jackson, December 1829) ("The Constitution declares that 'no new State shall be formed or erected within the jurisdiction of any other State, without the consent of its legislature. *If the General government is not permitted to tolerate the erection of a confederate State within the territory of one of the members of this Union against her consent, much less could it allow a foreign and independent government to establish itself there.*'") (emphasis added).

[2] *See, e.g.*, Prucha, at 22 (Letter from President Jefferson to William Henry Harrison, dated February 27, 1803) ("[tribes] will in time either incorporate with us as citizens of the United States, or remove beyond the Mississippi . . . . we presume that our strength and their weakness is now so visible that they must see we have only to shut our hand to crush them, and that all our liberalities to them proceed from motives of pure humanity only"); *id.* at 22 (statement of Secretary of War Calhoun to House of Representatives, dated December 4, 1818, ("Our laws and manners ought to supersede their present savage manners and customs"). Respondents and supporting amici also cite Congress' recent generous statements about tribal adjudicatory jurisdiction as support for their case. *See, e.g.*, Brief *Amici Curiae* of Pyramid Lake Paiute Tribe, et al., at 11-14. Omitted, though, from the legislative statements is any indication that Congress believes tribal courts may wield their jurisdiction against state officials. One might reasonably suppose that Congress would have signaled its intent to work such a radical adjustment had it in fact intended this change.

answer to this evolving perspective on the proper role of Indian Tribes in modern America and to the earnest desire to establish tripartite comity among Tribes, States and the Federal Government is not to alter bedrock understandings about the meaning of the Constitution. It rather is to develop properly-exercised federal and state statutes that account for these important developments. It is the role of state and federal legislatures alike to put these modern attitudes about Indian Tribes into positive law. And in many respects, they have done just that. When it comes to these claims, however, neither the Congress nor the Nevada legislature has legislated that Indian claimants may receive superior treatment to other Nevada residents when it comes to claims against the State or its officials.

Nor, contrary to one of the respondents' claims, does the State contend that Tribes are not sovereigns. *See* Brief *Amici Curiae* of the Pyramid Lake Paiute Tribe, et al., at 10. They simply are a different kind of sovereign. Much as counties and cities are limited sovereigns under state law, so Indian Tribes are limited sovereigns under federal law. Nothing about that limited sovereign status, however, gives Indian Tribes inherent authority to sue state officials in tribal court under tribal law. Neither has Congress ever delegated such an extraordinary grant of power to them.

Mr. Hicks' extended discussion of *Nevada v. Hall*, 440 U.S. 410 (1979), serves only to underscore the inapposite nature of Respondents' attempt to wedge tribes into the relationship that exists between States and the Federal Government, and among the States themselves. Hicks Br. at 24-30. The States came to the Union as full sovereigns. Indeed, the Union exists only by virtue of their willingness to cede voluntarily a portion of that sovereignty. *See Texas v. White*, 74 U.S. 700, 724-25 (1869); The Federalist No. 45, at 260 (James Madison) (Clinton Rossiter ed. 1961) ("The powers delegated by the proposed Constitution to the federal

government are few and defined. Those which are to remain in the State governments are numerous and indefinite"). It was this full complement of sovereignty that permitted the majority in *Hall* to analogize Nevada and California to "independent and completely sovereign nations," 440 U.S. at 417, and thereby to make Chief Justice Marshall's opinion in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), pertinent. Indian Tribes, in contrast, were dependent sovereigns possessing no inherent authority as to the States at the time of the Constitution's framing and necessarily had no sovereignty to contribute to the federal Union.

Equally unpersuasive is Hicks' effort to render the discovery doctrine of no present significance. *See* Hicks Br. at 31-37. While Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542 (1832), contrasted the discovery doctrine's theoretical basis with the "actual state of things" in preempting the State of Georgia's effort to apply its law to persons within the Cherokee Nation's lands, it nonetheless remains indisputable—and undisputed by Hicks himself—that the doctrine served as the basis for the Court's characterization of tribes as "domestic dependent nations" in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831). The question whether state law is preempted, moreover, differs qualitatively from whether a Tribe possesses inherent authority as to a State. The first question turns on the scope of congressional power as *delegated* by the States to Congress; the second turns on whether the "domestic dependent nation" status of Tribes negates any claim to inherent authority over not only the United States but also the States, since the Federal Government's plenary power over Indian affairs derived from the States themselves.

In the final analysis, respondents simply have not identified any tenable source of authority—whether in the Constitution, federal law, or inherent in their status as limited sovereigns—for ignoring (in truth, preempting) Nevada's laws

regarding suits against state officials. Absent such a cognizable theory of superior power, the tribal claimants must do what all Nevada residents must do—seek relief in state or federal court.

B. Respondents Cannot Bring Their Section 1983 Claim Against State Officials In Tribal Courts.

Also unavailing is respondents' section 1983 claim. As Nevada showed in its opening brief (Pet'r Br. 24-29), Congress did not *expressly* create any such action against state officials in tribal courts, as required when it attempts to alter "the constitutional balance between the Federal Government and the States." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). And at any rate it lacked the power to create such a claim. *See* Pet'r Br. 27-29. The tribal claimants offer several responses to these arguments, all unpersuasive.

As an initial matter, it bears emphasis that respondents have not offered a shred of historical evidence that the Congress that passed section 1983 meant to allow such claims in tribal court against non-consenting state officials. No such evidence exists, and that is presumably why respondents suggest that congressional intent is not even relevant to the issue at hand. *See* Fallon Tribe Br. at 45. On this basis alone, the claim should be dismissed.

Nor have respondents been willing to consider the questions the Court has asked in the past in deciding whether to extend section 1983 to new settings and new claims—specifically, the "history" and special "policy concerns" involved in suing government officials. *Richardson v. McKnight*, 521 U.S. 399, 404 (1997). *See* Pet'r Br. at 25-29. No such consideration has been offered; and none could be offered given the "anomalous and unheard-of proceedings" that respondents propose. *Alden v. Maine*, 527 U.S. 706, 727 (1999) (quotation omitted). The claims have no pedigree, and as the facts of this case well illustrate they are more apt to interfere with State-Tribal relations than advance them.

Instead, respondents argue simply that Tribes are sovereigns and as such tribal courts by definition must be competent tribunals for section 1983 actions. *See* Fallon Tribe Br. at 45-46. Even if tribal courts may be competent to hear certain federal claims, however, that does not mean Congress authorized them to hear section 1983 claims. And as shown (Pet'r Br. 25), the language of the statute says not a word about tribal courts.

Respondents also rely on a number of decisions holding that tribal courts may apply certain federal laws. Fallon Tribe Br. at 45-46. But the vast majority of these cases involve federal statutes designed by their terms specifically for Indian Tribes.[3] The only federal law involved in two other cases—*National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987)—is simply the tribal courts' authority initially to rule on their own jurisdiction (which itself is a federal question) over private individuals who are not members of the Tribe. That respondents feel compelled to rely on these inapt precedents merely confirms the difficulty of obtaining traction on this contention. The argument should be rejected.

C. The Expedience of Naming State Officials In Their Individual Capacity Does Not Alter These Principles.

In response to all of this, the tribal claimants primarily claim that pleading rules defeat Nevada's contentions. Just as

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[3] *See United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992) (action for penalties against member grazing livestock on tribal land without a tribal permit); *United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996) (ejectment and trespass action on behalf of a Navajo tribal member against another member); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 486 n.7 (1999) (by its reference to *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). *El Paso's* reference pertains to civil rights claims against tribal officials in tribal court, under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341).

precedent allows individual-capacity actions under section 1983 against state officials in federal court, they argue that similarly-styled actions may be brought in tribal court under tribal law and section 1983. Their reliance on this point is undifferentiated, and purportedly justifies all of Mr. Hicks' claims, whether in common-law tort, federal civil rights, or tribal civil rights. That is wrong.

To start with, no rule of pleading with which we are familiar allows a plaintiff to innovate a claim that the legislature did not. Here, as we have shown, no tenable evidence exists that Congress meant to create a section 1983 claim enforceable in tribal courts, which after all did not even exist when the statute was enacted. Nor, as we also have shown (Pet'r Br. 22-23), did the Tribe expressly establish a tribal-law claim against State officials. Respondents offer no answer to the latter point, and conclusory responses to the former.

No less fundamentally, the nullification of state immunity rules is not a matter of pleading creativity. Just as state residents may not bring state-law actions against state officials in disregard of Nevada immunity law merely by naming them in their individual capacity, neither may tribal claimants do the same under tribal law or section 1983. The one is no less disrespectful of Nevada law than the other.

Nor are these types of actions inconsequential. With a wide array of statutes and constitutional provisions to back her up, Nevada's Attorney General asserts, categorically, that vital state interests are implicated by the tribal-court actions. Having defended the state officials from the inception, she can fully attest that these types of actions threaten States' financial integrity, permit intervention in the processes of government, interfere with the allocation of scarce resources, and pose real threats to Tribal-State relations. *See Alden v. Maine*, 527 U.S. 706, 749-51 (1999). These state peace officers after all were sued because they investigated an off-reservation state crime, allegedly committed by a Nevada citizen located within the

State's boundaries. And Nevada's Wildlife Director was sued, and kept in the litigation for ten years, without any allegation ever being brought against him.

In response to the State's sovereign defense, the tribal respondents attempt to parlay federal doctrine permitting suits against individually-named officials into new, expansive tribal jurisdiction. No doubt the State accepts *Ex parte Young*, 209 U.S. 123 (1908), *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), *Hafer v. Melo*, 502 U.S. 21 (1991), among other decisions. But the extension of these decisions to tribal-court claims under tribal law and section 1983 should be flatly rejected. Not one of these cases or any other offers a coherent explanation for extending this Court's individual-capacity doctrine to claims in tribal court, as opposed to federal court. Still less is there any basis for doing so with regard to claims brought under tribal law. As we showed in the opening brief (Pet'r Br. 20-22, 27-29), these creative claims parallel an earlier effort to extend *Ex Parte Young* actions to claims brought under state law against States in federal court. For many of the same reasons that the Court rejected this effort to circumvent state immunity rules in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), it should do so here. The explanation for creating these federal-court, federal-law doctrines, together with the *ultra vires* fictions on which they rested, simply does not translate to this setting. *See id.* at 105 ("*Ex Parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution") (quoting *Perez v. Ledesma*, 401 U.S. 82, 106 (1971); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997) ("Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.").

Howlett v. Rose, 496 U.S. 356 (1990), is not to the contrary. It rested at most on the constitutional integration of state and federal courts. *Id.* at 367. Tribal courts, in contrast, lack *any* constitutionally-grounded role, and the rationale of *Howlett* should have no force with regard to them. Indeed, the very purpose of those courts is to enforce a Tribe's inherent authority which, as this Court has reiterated regularly, derives from sources wholly independent of the federal constitutional and statutory regime that section 1983 attempts to vindicate. *See, e.g., Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985). Neither the extension of section 1983 actions to tribal courts nor the extension of personal immunity principles to tribal courts will further the important national objectives that explain the development of these extraordinary federal-court doctrines.

Respondents and their *amici* deal with the federal structure of the Constitution and its bilateral allocation of power by denying its existence. The Fallon Tribe suggests that "traditional analysis has always relied heavily on the Constitution's recognition of three sovereigns," Fallon Tribe Br. at 32, and the United States implies the same by its reference to tribes and States as "concurrent sovereigns."[4] U.S.

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[4] The United States misapplies the term "concurrent sovereigns" to denote Tribes and States. The term is traditionally used with reference to state and federal governments. *See Petersburg Cellular P'ship v. Bd. of Supervisors of Nottoway Co.*, 205 F.3d 688, 700 (4th Cir. 2000) (quoting *Printz v. United States*, 521 U.S. 898 (1997), and citing *Alden v. Maine*, 527 U.S. 706 (1999), to explain that the "dual-sovereignty structure of the Constitution carefully preserves two, concurrent sovereigns over the people"); *see also The Federalist* No. 32, at 169 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("[t]he necessity of a concurrent jurisdiction results from the division of sovereign power; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor is not only a theoretic consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution").

Br. at 1 and 18. Hicks asserts that, "[b]y virtue of acts of Congress and rulings from this Court, tribes are now ensconced within the federalism framework." Hicks Br. at 45. But these bald assertions are mistaken, and utterly unsupported.

Perhaps the best evidence of the novelty of these claims is the extraordinary lengths to which the United States has gone to soften their impact. Having first ignored two centuries of history, tradition and practice, to say nothing of the plain language of the relevant laws, in order to support these innovations, the Federal Government attempts (U.S. Br. 24-30) to undo the impact of this striking departure from settled practices by rewriting the removal statute. In the Federal Government's view, the new susceptibility of state officials to tribal-law and section-1983 claims in tribal courts will not amount to much because States may remove the federal claims (and pendent tribal claims) to federal court under 28 U.S.C. § 1441. The problem is, section 1441 says not a word about removal from tribal courts. It mentions only removal from "a State court." 28 U.S.C. § 1441. Rather than presenting one more hurdle for the United States to clear in developing a theory that offers something to everyone, this language suggests something else—that Congress thought general federal-law claims could not be brought in tribal court in the first instance. The Federal Government's contention fails to account for this straightforward interpretation of the removal statute and in the end should be rejected.

D. State-Tribal Cooperation Will Not Be Advanced By Respondents' Claims.

In urging tribal jurisdiction over state officials, Mr. Hicks relies on the surprising contention that it will foster cooperation between States and Tribes. Hicks Br. at 43; *see also* Fallon Tribe Br. at 11. The authorities presented, however, do no more than demonstrate the level of cooperation that occurred before the Ninth Circuit's opinion in this matter. *See Nevada v. Hicks*, 196 F.3d 1020 (9th Cir. 1999). Doubtless, Nevada,

like many States, has encouraged cooperation between Tribes and state agencies. *See, e.g.*, NEV. REV. STAT. §§ 277.080 to 277.180. But the Ninth Circuit's decision puts these arrangements in jeopardy; it will not further them.

The existence of tribal jurisdiction here, for example, will cause great consternation for States and their employees who must perform law-enforcement activities relating to Indian affairs. Not only will these employees be forced to engage in activities that will expose them to new liabilities, but those liabilities will arise under laws and before tribunals that are not constrained by ordinary constitutional limitations and are not subject to external review.[5] For their part, Tribes will be reluctant to enter into cooperative arrangements that would voluntarily diminish the reach of their inherent powers in order to allay State concerns. State-tribal cooperation is far more likely to suffer than flourish if the Ninth Circuit's novel approach is accepted.

Nor is it true that "state courts have adjudicated state law claims against individually named tribal officials." Hicks Br. at

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[5] Though it is true that Nevada, for example, will indemnify its employees for judgments against them arising from actions taken in the course and scope of their duties, NEV. REV. STAT. § 41.0349, the state legislature has also decided that no award for punitive damages may be taken against the State. NEV. REV. STAT. § 41.035. Reconciliation of these disparate provisions is then left primarily to the State Board of Examiners, *see* Nev. Const. art. 5, § 21, to decide as a political question whether a state official may be indemnified for a punitive award. The ambiguity of the law can result in uncertainty for state employees. While this concern is tempered to some extent outside the tribal court system by the Due Process Clause of the Fourteenth Amendment and the availability of, *inter alia*, this Court's review (*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996)), no such assurance exists with respect to tribal court proceedings even if 25 U.S.C. § 1302(8) is construed to impose comparable limitations on tribal court judgments. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

20. While several decisions are offered to support the statement, *id.* at n.9, they do not in fact do so. For example, the issue was left unresolved in *Drumm v. Brown*, No. CV960079971, 1999 Conn. Super. LEXIS 1691, at *8 (Conn. Super. Ct. 1999). And *Hegner v. Dietze*, 524 N.W.2d 731, 735 (Minn. App. 1994), *Boisclair v. Imperial Granite Co.*, 51 Cal. 3d 1140 (Cal. 1990), *Drumm*, 1999 Conn. Super. LEXIS 1691, at *10, and *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654 (Ariz. 1971), all originated in Public Law 280 States. There, unlike here, the power of the State to supply the rule of decision is uncontested; i.e., presently, the issue is not merely immunity from suit but from the very authority of the Tribe to impose its inherent authority on Nevada or its representatives charged with carrying out the State's sovereign responsibilities. Pub. L. 83-280, 67 Stat. 588, *as amended*, 18 U.S.C. § 1162, 28 U.S.C. § 1360. Likewise, *Santa Clara Pueblo*, and *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir. 2000), involved federal, not state, jurisdiction. Lastly, the Court's general statement in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) ("[w]e have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State") supplies no standard to explain when and why such actions may be maintained. Respondents' contention also ignores an equal, if not greater, number of decisions that have dealt differently with tribal officials' immunity. *See* Pet'r Br. at 12. *See also Turner v. Martire*, 99 Cal. Rptr. 2d 587 (Cal. Ct. App. 2000) (tribal officials lose protection of tribal immunity if their actions were taken for their personal benefit).

E. The Plight Of William Molini Illustrates The Risks of Adopting the Ninth Circuit's Approach To Deciding Issues of Qualified Immunity.

As petitioners also demonstrated in their opening brief (Pet'r Br. 29-33), the Ninth Circuit erred in concluding that

petitioners' sovereign immunity defense is not jurisdictional, *see Nevada v. Hicks*, 196 F.3d 1020,1029, n.12 (9th Cir. 1999), and in failing to ensure that it was addressed at the outset. *See P. R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Petitioners also showed that if they cannot invoke the State's own immunity for their protection, they ought to be entitled to a form of qualified immunity that is jurisdictional in effect and that must be assessed by a federal court if not promptly decided in tribal court. The prudential considerations that normally require exhaustion in tribal court, *see National Farmers Union Ins. Cos.*, 471 U.S. 845 (1985), simply do not apply to immunity defenses raised by state officials in tribal courts.

The experience of one of the individual petitioners in this case fairly illustrates the reasons for this rule. William Molini was the Director of the Nevada Department of Wildlife in 1991 when Mr. Hicks sued him in tribal court. Mr. Hicks did not allege then, and has not alleged since, that Molini did anything wrong. "Petitioner Mr. Molini," it has now been acknowledged, "does not appear from the record to have acted personally within Indian country." Brief *Amici Curiae* for the Thlopthlocco Tribal Town, et al., at 2, n.2. While neither of the respondents specifically addresses Mr. Molini's continued presence in this matter, they now appear to concede that he should not have been named. *See* Hicks Br. at 3, n.2 ("On or about January 18, 2001, Mr. Hicks filed motions in both cases before the tribal court . . . to drop William Molini as a defendant"). This eleventh-hour development merely reflects the fact that naming Molini as a party was unfounded from the outset. Yet neither the federal nor tribal courts addressed the injustice, even though it was plainly presented. Only the risk of a negative outcome in this Court apparently has led respondents to do what should have been done at the outset.

Remarkably, despite the ten years it has taken to extract Mr. Molini voluntarily from the case, respondents still want more time in tribal court to address the question of qualified immunity. Brief of the Fallon Tribe at 42; *see also* Hicks Br. at 46-49; Brief *Amicus Curiae* of the Pyramid Lake Paiute Tribe at 27-28. In their view, the "factual context [involved in the qualified immunity defense] was never developed in the Tribal Court." Brief of the Fallon Tribe at 42.

But what "factual context" could there still be to develop? No such issues needed to be developed for Mr. Molini, as all apparently now agree. His defense was a challenge to the face of the complaint, not to the underlying facts. The same is true for the other individual petitioners. Their challenge arose from the four corners of the complaint, and their entitlement to relief was self-evident. To its credit, the United States recognizes as much:

> Hicks is seeking to hold petitioners liable in tort simply for executing, in accordance with their terms, facially valid search warrants that were issued by the state court and approved by the tribal court. . . . [S]uch conduct would fall well within the scope of the applicable immunity, whatever its precise boundaries.

U.S. Br. at 21; *see also* Brief *Amici Curiae* for the Thlopthlocco Tribal Town, et al., at 2 n.2. The State of Nevada has been making this precise argument for ten years now, all to no avail. The *Bleak-House* manner in which this case has been handled illustrates, first, why these actions should not be allowed in the first instance, and, second, why if they are allowed, qualified immunity defenses should be treated as jurisdictional in nature under *Puerto Rico Aqueduct*. Even today, Mr. Hicks cannot identify what clearly established federal right was violated by the officials. See *Baker v. McCollan*, 443 U.S. 137, 140 (1979). All that he has presented are a series of conclusory allegations. Hicks Br. at 3.

F. Even If State Immunity Itself Does Not Defeat Tribal Jurisdiction, No Such Jurisdiction Exists In This Case Under *Montana v. United States*.

As the opening brief also demonstrates (Pet'r Br. 36-44), *Montana v. United States*, 450 U.S. 544 (1981) creates a presumption against tribal jurisdiction over nonmembers, a presumption that should apply with special force to tribal claims against state officials. Respondents, however, attempt to counter *Montana*'s application here by claiming that tribal courts are "courts of general jurisdiction." Hicks Br. at 18. And they attempt to justify this conclusion by invoking the Court's and Congress' isolated statements about retained tribal sovereignty, but do so in complete disregard of the limitations that have been placed on that sovereignty. *See generally* Pet'r Br. 16-20.

Montana's two exceptions—based on consent and protection of tribal self-governance—plainly do not apply here. In executing their search warrants, the Nevada wardens were hardly "enter[ing] consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. And by executing the warrants with approval of a tribal judge, and in the company of tribal officers, the state officials did not engage in conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id.* at 566. Rather, their actions in deference to tribal authority simply respected the integrity of the tribal government.

1. Respondents overstate the relevance of several precedents.

Tribal adjudicatory jurisdiction over nonmembers is still an ill-defined proposition, even in the absence of state immunity arguments. Respondents seek in this case a form of tribal authority that the Court has never recognized before. Tribal

civil adjudicatory jurisdiction over nonmember defendants. Because this case involves state officials as nonmember defendants, however, it presents an ill-suited vehicle for making this argument.

Respondents and supporting *amici* take a broad view of this Court's decisions addressing jurisdiction over nonmembers. In truth, although the Court has suggested that nonmember defendants may be subject to a tribe's adjudicatory authority in the proper circumstances, it has never so held. Whenever the question has arisen regarding a specific defendant, tribal jurisdiction has either been found absent, or the question was not decided. *See, e.g., El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999) (no jurisdiction over nonmember defendant); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (no jurisdiction over nonmember defendant); *Duro v. Reina*, 495 U.S. 676 (1990) (no criminal jurisdiction over nonmember Indian); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (no decision on question of jurisdiction over nonmember defendant); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985) (no decision on question of jurisdiction over nonmember defendant); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (no criminal jurisdiction over non-Indian). Even in *Williams v. Lee*, 358 U.S. 217 (1959), the issue was the existence of state, not tribal, court jurisdiction.

Nor do other decisions promoting broad tribal authority apply. A number of them involved a Tribe's jurisdiction to tax in situations in which private, consensual *commercial* relationships had been formed. *See, e.g., Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980). The suggestion that the game wardens in this case were engaged in a commercial relationship with Mr. Hicks or his Tribe, not surprisingly, has never been advanced.

2. In respectfully seeking approval of the search warrant from the tribal court, the officers did not consent to jurisdiction.

The Fallon Tribe maintains that the "Wardens recognized and consented to the authority, processes, and procedures of the Tribe as a sovereign," Fallon Tribe Br. at 24, thus justifying assertion of jurisdiction over them in Mr. Hicks' civil actions. Yet, if ever there were a case in which "no good deed goes unpunished," this would be it. The state officials of course did not believe that they were consenting to suit by their actions, and indeed no existing legal precedent would have justified that conclusion. They were simply demonstrating courtesy for the tribal processes, as the Tribe itself ultimately acknowledges: "Both sovereigns [state and tribal] showed exemplary respect and cooperation, each one for the other." Fallon Tribe Br. at 10-11.

This argument also incorrectly assumes that state officials are powerless to pursue state law-enforcement objectives on a reservation—except with the Tribe's consent. A reservation is part of the State in which it lies. *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1945); *Draper v. United States*, 164 U.S. 240 (1896). The State also has jurisdiction over off-reservation crimes allegedly committed within the State by tribal members like Mr. Hicks. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962). When evidence of crime exists on a reservation within the boundaries of a State, the State is free to pursue the lead. A contrary rule would eliminate state law-enforcement jurisdiction on a reservation, even for the most egregious of state-law crimes, a diminution of state authority that has never been embraced by this Court.

3. Inability to sue state officials does not affect tribal sovereignty.

Respondents and their *amici* predict, but nowhere prove, dire effects if the Court fails to find the jurisdiction that the Tribe asserts. The Fallon Tribe charges that the officials' "allegedly actionable behavior on the reservation threatens and affects the Tribe." Fallon Tribe Br. at 25. It further claims that the State's argument against jurisdiction "impl[ies] second rate status and bias and incompetence of tribal institutions." Brief of Fallon Tribe at 11. Also: "Both the political integrity and health and welfare of the Tribe are directly affected in this case since an injury to a resident tribal member directly implicates the Tribe's important governmental interest in providing a forum to allow tribal members to seek redress." Brief *Amici Curiae* of Pyramid Lake Paiute Tribe, et al., at 23. And "[t]he power to adjudicate civil disputes arising on a sovereign's territory, whether involving citizens or non-citizens, is essential to the success of the Self-determination policy and a necessary attribute of sovereignty for Indian tribes as well as other governments." Brief *Amici Curiae* of the Confederated Tribes of the Colville Reservation, et al., at 21.

None of these Respondents and their *amici*, however, meaningfully explains why it is necessary for Tribes to have jurisdiction over state officials. The treatment accorded federal officials in state courts illustrates that no harm results from the inability of one sovereign's courts to call to account the officials of another sovereign. The Federal Officer Protection Removal Statute, 28 U.S.C. § 1442(a), for example, removes claims against federal officials filed in state courts, including civil rights claims. *Richards v. Harper*, 864 F.2d 85 (9th Cir. 1988). Yet no one contends that state sovereignty is impaired because state courts are deprived of hearing civil cases against federal officials. No more would tribal sovereignty be impaired if claims against state officials were not subject to tribal adjudicatory jurisdiction.

The State no more than the Federal Government maintains that its officials are absolutely immune. And like the Federal Government, U.S. Br. at 29 n.22, States are entitled to enforce their immunity rules when their public officials are sued in tribal court. In both settings, of course, errant officers whose actions harm any citizen may be called to account. Yet the remedy lies in federal courts or state courts, not tribal courts.[6]

CONCLUSION

Petitioners agree that Indian Tribes hold a unique place in the Nation, and as such are entitled to the utmost respect and fair treatment. But that does not mean that the Constitution authorizes Tribes to alter, preempt or abrogate State immunity rules regarding the conduct of their public officials. Respondents have not presented any authority or argument that compels a different conclusion. The State respectfully submits that the Ninth Circuit's judgment should be reversed.

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[6] Relying on Nev. Rev. Stat. § 41.430, Mr. Hicks claims that the State relinquished all civil jurisdiction on reservations. *See* Hicks Br. at 9, 26 n.13, and 45 n.33. The conclusion is mistaken. Section one of the statute is merely Nevada's assumption of *additional* jurisdiction permitted by Pub. Law 280 (67 Stat. 588), and section four is the relinquishment of such additional jurisdiction when Public Law 280 jurisdiction is retroceded. NEV. REV. STAT. §§ 41.430 (1) and (4). The result following retrocession is that state jurisdiction exists in Indian Country to the same extent it exists in any non-Public Law 280 state. *See* 25 U.S.C. § 1323(a); *see generally American Indian Law Deskbook* at 162 (2d ed. 1998). And *Snooks v. Ninth Judicial District Court,* 919 P.2d 1064 (Nev. 1996), also cited by Hicks for the proposition that Nevada courts have conceded away all civil jurisdiction in Indian Country, Hicks Br. at 26 n.13, is merely the adoption of the rule of *Williams v. Lee,* 358 U.S. 217 (1959), disavowing state jurisdiction in actions filed by non-members against tribal members.

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CONCLUSION

The judgment of the court of appeals should be affirmed.

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FLOYD HICKS, ET AL.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

1. Whether a tribal court may exercise adjudicatory jurisdiction over a suit brought by a tribal member against state officials in their personal capacities, where the suit arises out of the state officials' conduct on trust lands within the Tribe's reservation in the execution of a search warrant authorized by a tribal court.

2. Whether, when state officials sued in their personal capacities in tribal court invoke an immunity defense arising under federal law, the state officials ordinarily must litigate the defense in tribal court before proceeding to federal court.

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INTEREST OF THE UNITED STATES

The United States has long been "committed to a policy of supporting tribal self-government and self-determination." *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 856 & n.20 (1985). Central to tribal sovereignty is proper respect for tribal courts and other tribal institutions. The United States also has a strong interest in the orderly operation of a system of government in which States and Tribes, as coordinate sovereigns, occupy overlapping spheres of authority on reservations. That interest is advanced by recognizing that state officials are entitled, as a matter of federal law, to assert immunity defenses for conduct on a reservation within the scope of their authority and to obtain a federal forum to adjudicate federal claims initially brought against them in tribal court.

STATEMENT

1. "[T]ribal justice systems are an essential part of tribal governments," 25 U.S.C. 3601(5), and many Tribes have formal court systems to adjudicate disputes arising on their

reservations. See U.S. Comm'n on Civil Rights, *The Indian Civil Rights Act* 29-31 (1991); R. Strickland et al., *Felix S. Cohen's Handbook of Federal Indian Law* 332-335 (1982). The United States has provided comprehensive assistance to ensure the availability and quality of tribal courts.[1] Over the past two decades, the number of tribal courts, as well as the number of cases on their dockets, has increased sharply, and there have been significant advances in the professional qualifications of tribal judges and lawyers.[2]

Congress recognized in the Indian Tribal Justice Act, 25 U.S.C. 3601 *et seq.*, that Tribes possess "inherent authority to establish their own form of government, including tribal justice systems," which are "important forums for ensuring public health and safety and the political integrity of tribal governments" and are "the appropriate forums for the adjudication of disputes affecting personal and property rights." 25 U.S.C. 3601(4)-(6). The Senate Report accompanying that Act explained that "tribal courts are per-

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[1] See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 & n.21 (1978); see, *e.g.*, 25 U.S.C. 450, 450a (Indian Self-Determination and Education Assistance Act, providing funding and assistance for tribal government institutions, including courts); 25 U.S.C. 476 *et seq.* (Indian Reorganization Act, providing for reorganization of tribal governments); 25 U.S.C. 1301 *et seq.* (Indian Civil Rights Act of 1968, recognizing powers of tribal self-government, establishing bill of rights, and providing for development of model code of Indian offenses for tribal courts); 25 U.S.C. 3601 *et seq.* (Indian Tribal Justice Act, establishing Office of Tribal Justice Support within Bureau of Indian Affairs and authorizing appropriations to assist tribal courts). The Department of Justice has played an important role in fostering the development of tribal courts. See Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations, 61 Fed. Reg. 29,424 (1996).

[2] See Hon. William Canby, Chair of Ninth Circuit Task Force on Tribal Courts, *Tribal Justice Act: Hearing Before the Senate Comm. on Indian Affairs*, 104th Cong., 1st Sess. 58 (1995) ("Tribal Courts today are infinitely more competent and better staffed than they were thirty or even fifteen years ago."); Hon. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 2 (1997) ("The tribal courts, while relatively young, are developing in leaps and bounds.").

manent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals." S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993). And the Conference Report stated that "civil jurisdiction on an Indian reservation 'presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute.'" H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. 13 (1993) (quoting *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987)). See also Indian Tribal Justice Technical and Legal Assistance Act of 2000, §§ 2, 101, 106, 201, 202, Pub. L. No. 106-559, 114 Stat. 2778 (making similar findings and authorizing appropriations for tribal justice systems).

Congress has recognized tribal courts' jurisdiction to adjudicate important questions of federal law. For example, Congress has affirmed the exclusive jurisdiction of tribal courts to resolve many disputes under the Indian Child Welfare Act of 1978, see 25 U.S.C. 1911(a), and to enforce the Indian Civil Rights Act of 1968, see *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978). See also 12 U.S.C. 1715z-13(g)(5) (authorizing federal government to bring mortgage foreclosure actions against reservation homeowners in tribal or federal court). And, although no federal statute generally requires full faith and credit for tribal court judgments,[3] state courts routinely enforce such judgments.[4]

2. a. This case concerns a challenge to the jurisdiction of the Fallon Paiute-Shoshone Tribal Court over two suits brought by respondent Hicks, a tribal member, against

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[3] Congress has, however, imposed full-faith-and-credit requirements for specific categories of adjudications. See, *e.g.*, 18 U.S.C. 2265 (domestic violence orders); 25 U.S.C. 1911(d) (child custody orders); 25 U.S.C. 3106(c) (National Indian Forest Resources Management Act); 25 U.S.C. 3713(c) (American Indian Agricultural Resource Management Act).

[4] See *Fredericks* v. *Eide-Kirschmann Ford, Inc.*, 462 N.W.2d 164 (N.D. 1990); *Barrett* v. *Barrett*, 878 P.2d 1051 (Okla. 1994); *Gesinger* v. *Gesinger*, 531 N.W.2d 17 (S.D. 1995); *In re Custody of Sengstock*, 477 N.W.2d 310 (Wis. Ct. App. 1991); *In re Marriage of Red Fox*, 542 P.2d 918 (Or. Ct. App. 1975); cf. *Jones* v. *Meehan*, 175 U.S. 1, 31-32 (1899).

officials of the State of Nevada. The suits arise out of state game wardens' execution of two warrants issued by a state court to search Hicks's premises for evidence of a state misdemeanor offense, the killing of a big horn sheep. The wardens sought and received the tribal court's permission to execute the warrants. During each search, the wardens seized a mounted sheep head trophy; the wardens later returned the trophies, concluding that they were not evidence of an offense. Pet. App. A3-A4, B2-B3, E1-G1.

Hicks sued in tribal court to recover money damages allegedly sustained as a result of the execution of the warrants. He named as defendants the State of Nevada and various state and tribal officials in their official and personal capacities. He alleged federal civil rights violations, common law torts, and civil rights violations under tribal law. Pet. App. A4; *id.* at I1-I5 (amended complaint).

The state defendants (petitioners here) specially appeared in tribal court and moved to quash service of process, arguing that service was deficient and that the tribal court lacked personal jurisdiction over them. Pet. App. J1-J7. The tribal court granted the motion. *Id.* at L2. The Inter-Tribal Court of Appeals reversed. It held that service of process was valid and that personal jurisdiction existed over petitioners based upon their voluntary entry onto the Reservation and voluntary submission to the tribal court's jurisdiction in seeking the warrants. *Id.* at C1-C8.

b. Petitioners then filed this action in federal district court. They sought an injunction against the tribal court proceedings and a declaratory judgment that "the Fallon Tribal Court may not exercise jurisdiction over the State of Nevada and its officers and employees." The complaint named as defendants Hicks, the tribal court judge, and the tribal court itself (respondents here). Pet. App. B3-B4.

Hicks moved in tribal court to dismiss all claims against the State and its officers in their official capacities. The tribal court, which had stayed its proceedings during the

pendency of the federal court proceedings, lifted the stay to grant the motion. As a consequence, the district court held that questions regarding the tribal court's jurisdiction over the State and its officers in their official capacities were moot. Pet. App. B4, B18 n.3.

The district court subsequently granted summary judgment for respondents. Pet. App. B1-B24. The court held that petitioners had exhausted their tribal court remedies with respect to the jurisdictional question, as required by *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985). Pet. App. B7-B8. The court then held that the tribal court's exercise of jurisdiction over Hicks's suits comported with *Montana* v. *United States*, 450 U.S. 544 (1981), because providing a forum for the adjudication of tribal members' tort claims against nonmembers involving events on tribal or trust land on a reservation is important to a Tribe's political integrity. Pet. App. B13. The court further concluded that the tribal court was not deprived of jurisdiction because petitioners are state officials. The court explained that the potential availability of an immunity defense is not a jurisdictional bar to suit and that petitioners had not exhausted their tribal court remedies with respect to the merits of such a defense. *Id.* at B15-B17.

c. A divided panel of the Ninth Circuit affirmed. Pet. App. A1-A23. The panel held that "[t]he Tribe's unfettered power to exclude state officers from its lands implies its authority to regulate the behavior of non-members on that land." *Id.* at A11. The panel reasoned that tribal sovereignty over trust lands on the Reservation was not diminished by the tribal court's approval of the search warrants, which the panel characterized as allowing state officers to come onto those lands only "for a limited, clearly delineated purpose." *Ibid.* Accordingly, the panel held that, because the Tribe had authority to regulate the conduct of the officers on trust lands, the tribal court has civil adjudicatory jurisdiction over the officers' conduct. *Id.* at A12. The panel

declined to consider the merits of petitioners' immunity defenses because petitioners had not yet presented those defenses to the tribal court. *Id.* at A14-A15.

Judge Rymer dissented. In her view, because the tribal court had authorized the searches of Hicks's residence, the Tribe had ceded its right to exclude petitioners from the Reservation and therefore could not, under *Montana*, exercise jurisdiction over them. Pet. App. A16-A19.

SUMMARY OF ARGUMENT

A. The tribal court has jurisdiction over the claims against petitioners in their personal capacities for federal constitutional violations and tribal-law torts. Those claims arise out of petitioners' execution of search warrants within the Reservation on land held in trust for a tribal member. This Court has recognized that "tribes retain considerable control"—both regulatory and adjudicatory—"over nonmember conduct on tribal land" within a reservation. *Strate* v. *A-1 Contractors*, 520 U.S. 438, 454 (1997).

The Court has also recognized that Tribes possess authority over the conduct of nonmembers elsewhere within a reservation where that conduct involves "consensual relationships with the tribe or its members" or affects "the political integrity, the economic security, or the health or welfare of the tribe." *Strate*, 520 U.S. at 446 (quoting *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981)). Here, petitioners entered into a consensual relationship with the Tribe because, in order to execute the warrants, they were required to, and did, obtain authorization from the tribal court. Moreover, a Tribe's political integrity and welfare are threatened when state officials, invoking the Tribe's own authority, are alleged to have violated the rights of its members on its reservation.

B. The tribal court should be afforded the initial opportunity to consider petitioners' federal immunity defenses—which include not only qualified immunity under 42 U.S.C.

1983, but also an immunity from tribal-law claims for acts within the scope of their official duties. As the Court recognized in *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985), exhaustion of tribal court procedures promotes tribal self-government, enables the tribal court to consider the limitations on its own authority, and avoids simultaneous litigation in tribal and federal court. We have no reason to believe that petitioners' federal immunity defenses could not be adjudicated in tribal court—and then, if necessary, in federal court—before petitioners would be subject to full discovery and trial in tribal court.

C. Although the tribal court has jurisdiction over the claims against petitioners, they, like defendants in state court, should have an opportunity to obtain a federal forum for the adjudication of claims arising under federal law. Under 28 U.S.C. 1441, a state court defendant has a right to remove federal claims (and pendent state claims) to federal court. Here, a comparable result may be obtained by a federal court injunction against tribal court adjudication of the federal claims. See *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 485 (1999).

ARGUMENT

I. THE TRIBAL COURT HAS JURISDICTION OVER CLAIMS AGAINST THE PETITIONER STATE OFFICERS IN THEIR PERSONAL CAPACITIES BASED ON THEIR EXECUTION OF SEARCH WARRANTS ON RESERVATION TRUST LAND

A. Indian Tribes are unique political entities that possess inherent sovereignty "over both their members and their territory." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); see also *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 547-549 (1832). "[T]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal

sovereignty." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 451 (1997) (quoting *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987)). For that reason, this Court has recognized that tribal courts are an "appropriate forum[]"—sometimes the exclusive forum—for the adjudication of "disputes affecting important personal and property interests of both Indians *and non-Indians*." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978) (emphasis added). The Court has rejected attacks on the institutional competency of tribal courts as "contrary to * * * congressional policy," *Iowa Mut.*, 480 U.S. at 19, and to its own precedents, *Santa Clara Pueblo*, 436 U.S. at 65-66. See also 25 U.S.C. 3601 *et seq.*

The Court has upheld tribal courts' exercise of civil adjudicatory jurisdiction in various contexts affecting non-Indians. See, *e.g.*, *Williams* v. *Lee*, 358 U.S. 217, 223 (1959) (tribal court has exclusive jurisdiction to adjudicate on-reservation contract dispute brought by non-Indian against Indian; "[i]t is immaterial that respondent is not an Indian," because "[h]e was on the Reservation and the transaction with an Indian took place there"); *Santa Clara Pueblo*, 436 U.S. at 65-66 (tribal courts have exclusive jurisdiction to enforce federal guarantees to Indians and non-Indians under Indian Civil Rights Act); *Kennerly* v. *District Court*, 400 U.S. 423 (1971) (per curiam). See generally *New Mexico*, 462 U.S. at 335-336 ("[T]ribes have the power to manage the use of their territory and resources by both members and non-members, to undertake and regulate economic activity within the reservation, and to defray the cost of governmental services by levying taxes.").

Moreover, the Court has articulated a prudential rule that federal courts should, in deference to "tribal self-government and self-determination," refrain from considering challenges to a tribal court's exercise of jurisdiction over a case until the challenge has been considered by the tribal court itself. See *Iowa Mut.*, 480 U.S. at 15; *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985). Both of those cases

arose out of suits in tribal court against non-Indian defendants—and, in the latter case, "a political subdivision of the State," 471 U.S. at 847—based on their conduct within a reservation. Indeed, the Court recognized in *Iowa Mutual* that such suits "presumptively" are within a tribal court's jurisdiction, "unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18.

The Court recently held that a Tribe does not possess adjudicatory authority over a suit between non-Indians involving events on reservation lands over which the Tribe has relinquished regulatory authority. See *Strate*, 520 U.S. at 455 (involving right-of-way for state highway). At the same time, however, the Court "readily agree[d]" that "tribes retain considerable control over nonmember conduct on tribal land." *Id.* at 454; cf. *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 482 n.4 (1999) (distinguishing *Strate* as "deal[ing] with claims against nonmembers arising on state highways," whereas "the events in question here occurred on tribal lands"). It thus remains the case that a Tribe retains expansive authority—including civil adjudicatory authority—over nonmember conduct on "land belonging to the Tribe or held by the United States in trust for the Tribe." *New Mexico*, 462 U.S. at 331. Even on non-Indian fee lands within a reservation, a tribal court may exercise jurisdiction over nonmembers to the extent that they have "enter[ed] consensual relationships with the tribe or its members" or engaged in "conduct that threatens or directly affects the political integrity, the economic security, or the health or welfare of the tribe." *Strate*, 520 U.S. at 446 (quoting *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981)).

Petitioners assert (Br. 40-41) that this Court's precedents, including *Montana*, do not "establish[] a distinction" with respect to tribal jurisdiction over nonmembers on a reservation based on "land status." To the contrary, the Court has repeatedly recognized that a Tribe may exercise signifi-

cantly greater authority over the conduct of nonmembers on tribal or trust lands within its reservation. See, *e.g.*, *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982) ("the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose"). In *Montana* itself, the Court "agree[d]" with the court of appeals' holding that "the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe," or may enforce lesser restrictions on nonmembers' hunting and fishing there. 450 U.S. at 557. The Court then considered whether the Tribe could *also* regulate nonmembers' hunting and fishing on "reservation land owned in fee by nonmembers of the Tribe." *Ibid.* It was in that context that the Court held that the Tribe could not regulate nonmember hunting and fishing, because those activities did not implicate "consensual relationships" with the Tribe or "threaten the Tribe's political or economic security." *Id.* at 566. *Montana* thus drew the very jurisdictional distinction based on "land status" that petitioners seek to avoid. See *New Mexico*, 462 U.S. at 330-331 (describing distinction drawn in *Montana* based on land status).[5]

In subsequent cases, the Court has continued to focus on the status of the land on which the nonmember's activities occurred. Only where a Tribe relinquished its interests in reservation land has the Court confined the Tribe's jurisdiction over nonmembers to the circumstances enumerated in *Montana*. See, *e.g.*, *Strate*, 520 U.S. at 442, 454-456 (federal grant of right-of-way to the State precluded Tribe's exercise of proprietary rights and rendered highway equivalent of non-Indian fee land); *South Dakota* v. *Bourland*, 508

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[5] Petitioners also invoke (Br. 40-41) cases involving Tribes' criminal jurisdiction over nonmembers. But this Court has declined to equate Tribes' civil jurisdiction with their criminal jurisdiction. See, *e.g.*, *National Farmers*, 471 U.S. at 854-855 & nn.16, 17.

U.S. 679, 683, 694-695 (1993) (Tribe retained no inherent authority to regulate nonmember hunting and fishing on reservation lands held by United States for a flood-control project, where Tribe conveyed "all tribal * * * interests" in those lands to United States and "Congress clearly abrogated the Tribe's pre-existing regulatory control over non-Indian hunting and fishing"); *Brendale* v. *Confederated Tribes*, 492 U.S. 408, 433-448 (1989) (opinion of Stevens and O'Connor, JJ.) (distinguishing between fee lands in area where Tribe retained power to control access to, and character of, reservation land and fee lands in area where Tribe did not retain such power).

An approach that distinguishes between a Tribe's authority over tribal and trust lands, as opposed to non-Indian lands, within a reservation is consistent with reasonable expectations. As the Court observed in *Montana*, Congress would not have expected a Tribe to continue to exercise extensive jurisdiction over the activities of non-Indians on reservation lands that were alienated to a non-Indian. See 450 U.S. at 560 n.9. Nor would the non-Indian landowner expect the Tribe to exercise such jurisdiction. But the contrary expectation would exist with respect to reservation lands that are owned by a Tribe outright or that are held in trust for the Tribe or its members. A Tribe would reasonably expect that it retained its inherent sovereignty over such lands and that, because it could deny non-Indians access to those lands, it could regulate the activities there of anyone who was granted access. See *Merrion*, 455 U.S. at 136-148. Correspondingly, a non-Indian would reasonably expect that, in entering such reservation lands, he subjects himself to regulation by the Tribe.[6]

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[6] Contrary to petitioners' contention (Br. 43), an approach that based a Tribe's civil jurisdiction over the activities of nonmembers on a reservation solely on the *Montana* exceptions—and not in the first instance on whether those activities occurred on tribal or trust land—would likely be

B. The court of appeals correctly held that the tribal court possessed jurisdiction over Hicks's claims against petitioners in their personal capacities for federal constitutional violations and tribal-law torts allegedly committed while executing search warrants on the Reservation.

1. It appears to be undisputed that the conduct giving rise to those claims—the search of a tribal member's premises and seizure of his property—took place on reservation land held in trust for an individual Indian. See Pet. App. A3, B2, F1, G1, I2-I3. The tribal court's jurisdiction thus was invoked with respect to "nonmember conduct on tribal land" —conduct over which, as the Court recognized in *Strate*, "tribes retain considerable control." 520 U.S. at 454; see also *New Mexico*, 462 U.S. at 332; *Montana*, 450 U.S. at 557. The Tribe's authority over that land was not "alienated," as petitioners suggest (Br. 44), when they obtained the tribal court's permission to enter the land for the limited purpose of executing the warrants. Indeed, even in circumstances where a Tribe more extensively relinquished its authority to exclude certain non-Indians from tribal lands by entering into a long-term lease with them, the Court held that the Tribe did not thereby relinquish its authority to tax (or, presumably, otherwise to regulate) their activities on the lands. *Merrion*, 455 U.S. at 137-144. Here, moreover, in recognizing that a warrant to search Hicks's premises would be effective only if approved by the tribal court, the state court confirmed the Tribe's jurisdiction over that land. See Pet. App. G1 ("This Court has no jurisdiction on the Fallon Paiute-Shoshone Indian Reservation and, before any search is conducted in furtherance hereof, an approval authorizing same must be obtained from the Fallon Tribal Court.").[7] The

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less, rather than more, "reliable" or "workable" in practice than the current approach.

[7] As a general matter, although state officials have jurisdiction to investigate and prosecute crimes on a reservation that exclusively involve non-Indians, see *United States* v. *McBratney*, 104 U.S. 621 (1881), they do

tribal court exercised that jurisdiction not only by approving the warrants, but also by imposing conditions on their execution. See *ibid.* (limiting first search "to exterior premises only and to vehicles thereon").

2. The tribal court was entitled to exercise jurisdiction here even if one accepts, *arguendo*, petitioners' (erroneous) view that, unless one of *Montana*'s exceptions applies, a tribal court cannot exercise jurisdiction over nonmembers' conduct even on tribal or trust land within a reservation.

Under *Montana*'s first exception, which recognizes that a Tribe's "inherent sovereign power" extends to "the activities of nonmembers who enter consensual relationships with the tribe or its members," 450 U.S. at 565, petitioners entered into a consensual relationship with the Tribe when they sought and received the tribal court's permission to exercise their state authority within the Reservation for a limited purpose. They would have understood, as the state court advised them (see Pet. App. G1), that they could execute the warrants only with the tribal court's permission. They would also have understood that the tribal court could, and

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not have jurisdiction with respect to crimes involving Indian perpetrators or Indian victims. In addition, on those reservations (unlike this one) where Public Law 280 is applicable, state officials have jurisdiction to investigate and prosecute crimes involving Indians as well. See p. 19 & note 11, *infra*. But, as the state court recognized when it issued the warrants in this case, its jurisdiction did not extend to Indian lands on the Reservation, and, for similar reasons, state officials had no inherent authority to enter onto tribal or trust lands within the Reservation in the circumstances of this case. Cf. *Benally* v. *Marcum*, 553 P.2d 1270 (N.M. 1976) (state officers cannot arrest Indian on reservation for off-reservation crime, but must instead follow tribal procedures); *Arizona* v. *Turtle*, 413 F.2d 683 (9th Cir. 1969) (same for extradition to another State), cert. denied, 396 U.S. 1003 (1970); but cf. *State* v. *Mathews*, 986 P.2d 323 (Idaho 1999) (state officers may execute search warrant in absence of tribal procedures), cert. denied, 120 S. Ct. 1190 (2000). See also *Miccosukee Tribe* v. *United States*, No. 00-3453-CIV (S.D. Fla. Dec. 15, 2000) (enjoining service of subpoena issued by state court to Indians on reservation to appear as witnesses in state criminal case).

indeed did (see *ibid.*), impose conditions on their execution of the warrants. Surely, if petitioners had violated any express condition that the tribal court imposed (*e.g.*, if they had executed the first warrant inside Hicks's residence), the tribal court would not have been powerless to call them to account. Cf. *Merrion*, 455 U.S. at 144 (recognizing that Tribe may "oust" non-Indian granted permission to enter its reservation if he does not comply "with the initial conditions of entry"). Accordingly, much like a non-Indian merchant who chooses to engage in business on a reservation with members of a Tribe, see *Williams*, 358 U.S. at 220, petitioners chose to enter into a consensual relationship with the Tribe and its members.[8]

Under *Montana*'s second exception, which recognizes a Tribe's authority over nonmember "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," 450 U.S. at 566, a tribal court may exercise jurisdiction over nonmembers who are alleged to have invoked the Tribe's own authority to violate the legal rights of its members on its reservation. At least in the circumstances here, where state officers executed a warrant approved by a tribal court and were accompanied by a tribal officer in doing so, the Tribe's "political integrity" and "welfare" are significantly implicated. Indeed, the Indian Civil Rights Act obligates the Tribe, in "exercising powers of self-government," to respect "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures." 25 U.S.C. 1302(2). Cf. *Davis* v. *Muellar*, 643 F.2d

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[8] Contrary to petitioners' assertions (Br. 37), the state game wardens' conduct here does not "parallel[]" the non-Indian truck driver's conduct in *Strate*. It is disingenuous for petitioners to contend (*ibid.*) that "Hicks was not a party to the relationship between the state officials and the Tribe." Hicks and his property were the subject of the state officials' dealings with the Tribe; indeed, Hicks was an intended beneficiary of the tribal court's limiting of the first search to the exterior of his residence.

521, 525 n.8 (8th Cir.) ("refusal of state police officers to recognize legitimate tribal judicial authority while on the reservation is at least to some extent state interference with tribal sovereignty"), cert. denied, 454 U.S. 892 (1981).

C. Petitioners argue (Br. 7), however, that Tribes have been divested of *any* "judicial power over state officials," regardless of the capacity in which they are sued. Petitioners cannot point to any Treaty or Act of Congress divesting Tribes generally, or the Fallon Paiute-Shoshone Tribe specifically, of all power to adjudicate claims against state officers in their personal capacities. Cf. *Iowa Mut.*, 480 U.S. at 18. But petitioners assert (Br. 9-29), based on principles of sovereign and qualified immunity, that state officials may never be sued in tribal court. Petitioners are mistaken.

It is indisputable that the underlying suits in tribal court are against state officers sued solely in their personal capacities. Pet. App. A5, A13, A23 n.13; see pp. 4-5, *supra*. See *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991) (explaining distinction between personal- and official-capacity suits). The sovereign immunity of a State does not pose any jurisdictional bar to a suit against a state officer in his personal capacity. That is not a rule of recent invention, or one limited to Section 1983 actions. As a leading torts treatise has observed, "[t]he Anglo-American tradition did not include a general theory of immunity from suit or from liability on the part of public officers." 5 F.V. Harper et al., *The Law of Torts* § 29.8, at 653-654 (2d ed. 1986). That principle has been repeatedly recognized by this Court in cases involving common-law tort and contract claims as well as claims for federal constitutional violations. In *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), for example, the Court explained that, if the "wrongful actions" of "[g]overnment officers" are "such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit

against him." *Id.* at 686. Thus, "[i]n a suit against the officer to recover damages for the agent's personal actions" in the performance of his duties, the "question is easily answered" that the suit is not against the government and thus is not barred by sovereign immunity. *Id.* at 687; accord, *e.g.*, *Hafer*, 502 U.S. at 30 (sovereign immunity does not bar Section 1983 suits against state officials in their personal capacities); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 462 (1945) ("Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally."); *Bad Frog Brewery, Inc.* v. *New York State Liquor Auth.*, 134 F.3d 87, 102 (2d Cir. 1998) (sovereign immunity does not bar federal courts from entertaining suits against state officers in their personal capacities for violations of state law).

Although immunity defenses are available in tribal court to state officers sued in their personal capacities (see Part II, *infra*), the availability of such defenses does not divest the tribal court of jurisdiction. See *Larson*, 337 U.S. at 687 n.7 (contrasting "limitations on the court's jurisdiction to hear a suit directed against the sovereign" with immunity defenses of the sovereign's officers); *Crawford-El* v. *Britton*, 523 U.S. 574, 587 (1998) (explaining that qualified immunity is an affirmative defense and the burden of pleading it rests with the defendant). A tribal court thus has jurisdiction to decide, in the first instance, whether any immunity defenses protect petitioners from suit in this case. See *El Paso*, 526 U.S. at 485 n.7 (recognizing general competence of tribal courts to adjudicate federal defenses).[9]

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[9] There is no occasion in this case for the Court to decide whether sovereign immunity would bar all unconsented suits in tribal court against a State or against state officials in their official capacities. Cf. *United States* v. *Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986) (enjoining tribal court injunctive action against federal officers in their official

II. STATE OFFICERS SUED IN TRIBAL COURT ARE ENTITLED TO FEDERAL IMMUNITY DEFENSES, WHICH ORDINARILY SHOULD BE ADJUDICATED INITIALLY IN TRIBAL COURT

In our view, although Nevada's sovereign immunity does not extend to state officials sued in tribal court in their personal capacities, federal law does afford state officers immunity from such suits for conduct within the scope of their official duties. Thus, as we explain below, state officers sued in tribal court, whether under federal or tribal law, may assert federal immunity defenses, although the basis and scope of the defense may differ in the two settings. We agree with the courts below that the prudential tribal court exhaustion rule of *National Farmers* and *Iowa Mutual* ordinarily should apply to those federal immunity defenses as they do to federal jurisdictional defenses.

1. State officials who are sued under 42 U.S.C. 1983 for violations of federal statutory or constitutional rights are entitled to "qualified immunity"—*i.e.*, they are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999). The same qualified immunity defense applies, as a matter of federal law, whether the Section 1983 action is brought in federal or state court. See *Howlett* v. *Rose*, 496 U.S. 356, 375 (1990) ("The elements of, and the defenses to, a federal cause of action are defined by federal law."). The defense therefore necessarily applies in

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capacities), cert. denied, 481 U.S. 1069 (1987); 5 U.S.C. 702 (waiving sovereign immunity to such suits only in federal court). We assume for present purposes, however, that a tribal court could not entertain an unconsented suit against the State itself, or a suit for damages against state officers in their official capacities. Cf. *Kiowa Tribe* v. *Manufacturing Tech., Inc.*, 523 U.S. 751 (1998) (sovereign immunity bars unconsented suit for damages against Tribe in state court).

tribal court as well. We do not understand respondents to contend otherwise. See Br. in Opp. 24-25.

2. As to tort claims arising under tribal law that are asserted against state officers, an immunity defense also should be available, as a matter of federal law, to the extent that those officers acted within the scope of any state duties that federal law authorized them to perform on a reservation.[10] An analogous defense should be available to tribal officials sued in state court on state common-law tort claims to the extent that they acted within the scope of their federally protected tribal authority.

Such an immunity defense, based on our constitutional structure relating to Indian affairs, would serve an important federal interest: the orderly operation of a system of government in which the States and the Tribes, as coordinate sovereigns, occupy overlapping spheres of authority. Inevitably, the agents of one sovereign, in the conduct of their official duties, come within the adjudicatory jurisdiction of the other sovereign. It is sometimes essential that they do so. And they ordinarily should be able to act with the assurance that, if they do not exceed the scope of the authority granted them by their own sovereign (and any authority confirmed to them by the other sovereign), they are immune from suit in the other sovereign's courts.

The overlapping spheres of authority of the States and the Tribes are particularly evident with regard to criminal law enforcement on a reservation. Ordinarily, while the United States and the Tribe have jurisdiction over crimes involving Indian perpetrators or victims, the State has jurisdiction over crimes involving non-Indians. See, *e.g.*, 18 U.S.C. 1152, 1153; *United States* v. *McBratney*, 104 U.S. 621 (1881); see

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[10] The Court has recognized federal common-law defenses to state causes of action in a variety of contexts in which important federal interests are implicated. See, *e.g.*, *Boyle* v. *United Tech. Corp.*, 487 U.S. 500 (1988); *Westfall* v. *Erwin*, 484 U.S. 292 (1988); see also *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 233-236 (1985).

also *Duro* v. *Reina*, 495 U.S. 676, 680-681 n.1 (1990) (describing the "complex patchwork of federal, state, and tribal law" allocating criminal jurisdiction in Indian country). On reservations covered by Public Law 280,[11] however, the State exercises jurisdiction over crimes involving Indians as well as non-Indians (while the Tribe retains concurrent jurisdiction over crimes committed by Indians). And, pursuant to agreements between the United States and a State, see 25 U.S.C. 2804, state officers may be authorized to enforce federal or tribal law on a reservation. Similar agreements may give tribal officers authority to enforce state law on a reservation. See also *Strate*, 520 U.S. at 456 n.11.

The federal statutory scheme thus contemplates—and sometimes effectively requires—that state officers act within a reservation. It is a necessary incident of that scheme that they be entitled, as a matter of federal law, to immunity from suit under tribal law for acts within the scope of their authority. Tribal law cannot make it unlawful for state officers to carry out functions they have been authorized by federal law to perform. Indeed, Congress has specifically provided a degree of protection from liability for state (or tribal) officers performing federal law-enforcement responsibilities on a reservation pursuant to an agreement. See 25 U.S.C. 2804(f) (treating such state or tribal officers as federal employees for purposes of the Federal Tort Claims Act); see p. 21 note 14, *infra* (discussing suits against federal employees). If the rule were otherwise, state officers could be deterred from entering the reservation—and thus from fully carrying out law-enforcement responsibilities assigned

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[11] Public Law 280, 67 Stat. 588 (codified as amended at 18 U.S.C. 1162, 25 U.S.C. 1321 *et seq.*, and 28 U.S.C. 1360) granted certain States the authority to exercise criminal jurisdiction in Indian country and made 18 U.S.C. 1152 and 1153 inapplicable in those areas. Nevada, which initially assumed Public Law 280 jurisdiction over reservations in the State, has since retroceded all such jurisdiction. See 40 Fed. Reg. 27,501 (1975); 53 Fed. Reg. 5837 (1988).

to them under federal (and state) law for the protection of the reservation community—for fear of being held personally liable in tribal court under tribal law. Similarly, tribal officers could be deterred from going outside the reservation in the course of their official duties—and thus from carrying out law-enforcement responsibilities they are authorized by federal (and tribal) law to perform—for fear of being held personally liable in state court under state law.[12]

A structural immunity defense that is available, as a matter of federal law, to state officers sued under tribal law and tribal officers sued under state law serves essentially the same purposes as the immunity defenses that have long been available, under the Supremacy Clause and federal common law, to federal officers sought to be held criminally or civilly liable under state law. See, *e.g.*, *Westfall* v. *Erwin*, 484 U.S. 292, 296-300 (1988) (federal officers are entitled to absolute immunity from state-law tort suits arising out of discretionary acts within the scope of their official duties); *In re Neagle*, 135 U.S. 1, 75 (1890) (a federal officer "*cannot* be guilty of a crime" under state law for "an act which he was authorized to do by the law of the United States," "if in doing that act he did no more than what was necessary and proper for him to do"). Such immunity defenses serve to "promot[e] effective government" by freeing government officials from the threat of liability or prosecution that could cause them to be "unduly timid in carrying out their official duties." *Westfall*, 484 U.S. at 295-296. They also assure that one government does not enforce its own laws "in such a manner

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[12] For example, in order to travel from one part of a reservation to another in pursuit of a fleeing suspect, a tribal police officer may need to drive outside the reservation. If a State were to prosecute the officer for exceeding the posted speed limit, or using an emergency light and siren, significant federal interests would be implicated. Cf. *Cabazon Band of Mission Indians* v. *Smith*, 34 F. Supp. 2d 1201 (C.D. Cal. 1998) (similar question), appeal pending, No. 99-55229 (9th Cir.).

as to paralyze the operations of the [other] government" within the sphere of its authority. *Neagle*, 135 U.S. at 62.[13]

It is unnecessary for the Court now to "define the precise boundaries of official immunity" in this context. *Westfall*, 484 U.S. at 299 (declining to do so in similar circumstances). The scope of federal immunity available to state and tribal officers may appropriately be informed by the scope of the immunity available to federal officers in similar circumstances under the Constitution, federal common law, and federal statutes.[14] Here, as we read the bare allegations of the tribal court complaints (see Pet. App. I1-I5), Hicks is seeking to hold petitioners liable in tort simply for executing, in accordance with their terms, facially valid search warrants that were issued by the state court and approved by the tribal court. We submit that, while the matter is not yet ripe for review in this Court, such conduct would fall well within the scope of the applicable immunity, whatever its precise boundaries.

3. Ordinarily, with respect to federal immunity defenses, as with respect to federal jurisdictional defenses, tribal

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[13] A number of courts have recognized that tribal officers are entitled to such immunity defenses. See, *e.g.*, *Boisclair* v. *Superior Court*, 41 Cal. 3d 1140, 1157-1158 (1990); *White Mountain Apache Indian Tribe* v. *Shelley*, 480 P.2d 654, 657-658 (Ariz. 1971); *Turner* v. *Martire*, 82 Cal. App. 4th 1042 (2000); *Hegner* v. *Dietze*, 524 N.W.2d 731, 735 (Minn. Ct. App. 1994); see also *Davis* v. *Littell*, 398 F.2d 83 (9th Cir. 1968), cert. denied, 393 U.S. 1018 (1969).

[14] After this Court's decision in *Westfall*, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the Westfall Act, which effectively confers immunity on federal employees for all common-law torts committed within the scope of their employment. If the Attorney General certifies that the employee was "acting within the scope of his office or employment at the time of the incident out of which the claim arose," the case is removed to federal court if originally filed in state court, the United States is substituted as the defendant, and the case is governed by the Federal Tort Claims Act. 28 U.S.C. 2679(d); see *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 419-420, 430-432 (1995).

courts should be given "the first opportunity to evaluate the factual and legal bases for the challenge." *National Farmers*, 471 U.S. at 856; see also *El Paso*, 526 U.S. at 485 n.7 (noting that "the existence of a federal preemption defenses in the more usual sense would [not] affect the logic of tribal exhaustion" because, "[u]nder normal circumstances, tribal courts, like state courts, can and do decide questions of federal law"). Applying the exhaustion requirement to immunity defenses would serve several of the salutary purposes identified in *National Farmers*, such as promoting "tribal self-government and self determination," enabling the tribal court to consider the limits on its own authority, avoiding the inefficiency associated with the pendency of a single dispute in two judicial forums, and allowing a full record on relevant factual and legal issues to be developed in the tribal court. See 471 U.S. at 856-857. Moreover, because immunity defenses may also be available by reference to tribal law,[15] the tribal court can consider all such defenses together.

As the Court recognized in *National Farmers*, however, tribal court exhaustion is a prudential rule that may be dispensed with in appropriate circumstances, such as where it "would be futile because of the lack of an adequate opportunity" to raise the challenge. 471 U.S. at 856 n.21. A question could arise as to whether full exhaustion of tribal court remedies should be required if a defendant's federal immunity defenses cannot be fully adjudicated in advance of

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[15] For example, officials of the Fallon Paiute-Shoshone Tribe are entitled to immunity "for any act performed in the course of duty or in the reasonable belief that such actions were within the scope of official duties, unless it is established that such action was taken with malicious intent or in bad faith." Law & Order Code 1-10-040(a). A tribal court might conclude that a comparable immunity should apply to state officials in tribal court, whether based on comity (cf. *Littell*, 398 F.2d at 86), choice of law (see Law & Order Code 1-30-040 (incorporating Nevada civil law)), federal principles of non-discrimination (cf. *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989)), or other grounds.

trial. An immunity defense is "meant to give government officials a right, not merely to avoid standing trial, but also to avoid the burdens of such *pretrial* matters as discovery," upon the favorable resolution of threshold legal issues (*e.g.*, whether their alleged conduct violated clearly established rights). *Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996) (internal quotation marks omitted). Arguably, at least, that purpose would be defeated if, for example, a defendant had to wait until after trial to obtain review, in the tribal court system and then in the federal court system, of the tribal trial court's rejection of a federal immunity defense. In those circumstances, a defendant perhaps should be allowed to take his federal immunity defenses immediately to federal court, so as to preserve in a meaningful way any "entitlement not to stand trial or face the other burdens of litigation." *Id.* at 306; but see *Johnson* v. *Fankell*, 520 U.S. 911, 916-923 (1997) (States need not provide for interlocutory review of qualified immunity rulings under Section 1983).

There is, however, no need to resolve that issue here. The present record offers no basis to conclude that petitioners' federal immunity defenses could not be adjudicated in advance of any trial in this case. As the courts below recognized (see Pet. App. A12-A14, B16), petitioners have not yet asked the tribal court to decide whether they have valid immunity defenses to any of Hicks's claims. Although petitioners invoked the doctrines of "sovereign immunity" and "qualified immunity" in the tribal court, they did so only in support of their contention that the tribal court lacked personal jurisdiction over them. *Id.* at A13. Accordingly, we read the tribal courts' rulings—such as the tribal trial court's statement that "it is not prevented by * * * qualified immunity from lawfully exerting personal jurisdiction over" petitioners, *id.* at A12-A13—as addressing only a jurisdictional challenge. We note that the tribal trial court, in the severed portion of the case against the tribal defendants, did

entertain pretrial motions to dismiss on immunity grounds.[16] Thus, given the absence of any showing that petitioners could not obtain a definitive resolution of their federal immunity defenses in advance of any trial, petitioners should be required to present those defenses to the tribal court in the first instance.

III. DEFENDANTS SUED IN TRIBAL COURT, LIKE THOSE SUED IN STATE COURT, SHOULD BE GIVEN THE OPPORTUNITY TO HAVE FEDERAL CLAIMS AGAINST THEM ADJUDICATED IN FEDERAL COURT

The fact that the tribal court has jurisdiction as an original matter over respondent Hicks's claims against petitioners under federal and tribal law does not necessarily dictate that all of those claims must remain in tribal court. Petitioners do not suggest the possibility of a mechanism, parallel to removal, that would enable a defendant sued in tribal court on a federal cause of action to have the case heard in federal court. But we believe that such a mechanism, if requested, would be appropriate in the circumstances of this case.

As noted above (at 8-9), in *Iowa Mutual* and *National Farmers*, the Court articulated a rule of comity that gives a preference to tribal courts for the adjudication in the first instance of claims that are brought there by Indians, involve

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[16] Two of petitioners' co-defendants—the tribal judge who approved the warrants and a tribal officer who participated in their execution—filed pretrial motions to dismiss raising immunity defenses. The tribal court ruled before trial that the judge was not entitled to absolute immunity under tribal law, but was potentially entitled to qualified immunity. *Hicks* v. *Harold*, Nos. CV-FT-91-034 and CV-FT-92-031 (Fallon Tribal Ct. May 18, 1992). Although the court reserved ruling on qualified immunity, apparently to assess whether the evidence demonstrated that the defendants acted with the "malicious intent" or "bad faith" that would defeat immunity under tribal law (see p. 22 note 15, *supra*), it ultimately granted a directed verdict on six counts on, *inter alia*, qualified immunity grounds. Decision and Order Denying All Relief As to Plaintiff's Second Amended Complaint at 4-5, *Hicks* v. *Harold*, *supra* (Sept. 2, 1993).

on-reservation conduct, and arise under tribal (or perhaps state) law. Only after tribal court procedures are exhausted may the federal courts review federal issues that arose in the case, such as whether the tribal court properly exercised jurisdiction over a suit against persons who were not members of the Tribe. See *Iowa Mut.*, 480 U.S. at 16-19; *National Farmers*, 471 U.S. at 855-857.[17]

A different rule would be appropriate, however, where a suit brought in tribal court arises directly under federal law, such as a suit under 42 U.S.C. 1983 alleging violations of federal constitutional or statutory rights. Ordinarily, when a defendant is sued in state court on a claim arising under federal law, the defendant is entitled to remove the case to federal court. See 28 U.S.C. 1441. As a consequence, both the plaintiff *and* the defendant have the right to insist upon a federal forum, rather than a state forum, for the adjudication of a federal cause of action.[18]

Section 1441 refers to removal only from "a State court"; it does not provide for removal from a tribal court. See *Becenti* v. *Vigil*, 902 F.2d 777, 779-780 (10th Cir. 1990) (holding that no right exists under the federal officer removal statute to remove a case from tribal court). It is doubtful, however, that Congress intended to deny tribal court

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[17] The underlying causes of action in tribal court in *Iowa Mutual* and *National Farmers* did not arise under federal law. The only federal question in those cases in federal court was whether the tribal courts had jurisdiction over the non-federal claims. In our view, however, other federal questions arising in cases brought in tribal court should also be subject to review in federal court. See *Stock W. Corp.* v. *Taylor*, 964 F.2d 912, 920 (9th Cir. 1992) (en banc) (abstaining to permit tribal court to make choice-of-law determination in the "first instance").

[18] A defendant, like a plaintiff, may perceive various advantages from the choice of a federal forum for the adjudication of federal claims. Such perceived advantages might include rules of procedure providing (*inter alia*) for liberal discovery, the greater availability of summary judgment, the right to a jury trial, geographic proximity, the greater expertise of federal courts in dealing with questions of federal law, and the insulation of life-tenured federal judges from popular pressure.

defendants the right given state court defendants to elect a federal forum for the adjudication of causes of action under federal law. It is more likely that Congress simply did not consider the matter.

The Court faced an analogous situation in *El Paso*. The Price-Anderson Act converts all claims of "public liability" arising out of nuclear incidents into claims under federal law and provides for the removal of all cases raising such claims from state court to federal court. See 42 U.S.C. 2210(n)(2). But Congress was silent on the treatment of similar claims filed in tribal court. The Court concluded that "inadvertence seems the most likely" explanation for "Congress's failure to provide for tribal-court removal." 526 U.S. at 487. Accordingly, the Court held that the federal courts are entitled to decide, without awaiting tribal court exhaustion, whether claims filed in tribal court are encompassed by the Price-Anderson Act and, to the extent they are, to enjoin their prosecution. *Id.* at 487-488. The Court noted that Congress "expressed an unmistakable preference for a federal forum, at the behest of the defending party, both for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal is contested." *Id.* at 484-485. It then reasoned that an "[i]njunction against further litigation in tribal courts would in practical terms give the same result as a removal"—*i.e.*, "if [the tribal court plaintiffs] then should wish to proceed they would be forced to refile their claims in federal court." *Id.* at 485.

Similarly, here, the general removal statute, 28 U.S.C. 1441, reflects an "unmistakable preference for a federal forum, at the behest of the defending party," *El Paso*, 526 U.S. at 484, for adjudicating claims arising under federal law. Thus, in the absence of any affirmative indication that Congress intended to deny tribal court defendants the same right as state court defendants to have federal claims heard in federal court, tribal court defendants should be afforded

an opportunity to obtain, if necessary, an "[i]njunction against further litigation in tribal courts [that] would in practical terms give the same result as a removal." *Id.* at 485.[19] Since removal typically operates with respect to the entire case—both the federal claims and any pendent state-law claims—such an injunction in this case could operate with respect to the entire case as well. In certain circumstances, however, the federal court should decline to enjoin tribal court litigation of non-federal claims, such as where federal law vests exclusive jurisdiction over those claims in the tribal court or where the governing tribal law cannot readily be ascertained. Cf. 28 U.S.C. 1367(c) (identifying circumstances in which district courts may decline to exercise supplemental jurisdiction); 28 U.S.C. 1441(c) (providing that a district court, "in its discretion, may remand all matters in which State law predominates"). Moreover, since a defendant's right to remove a case from state court is lost if not timely asserted, see 28 U.S.C. 1446(b), the federal court may appropriately deny an injunction against tribal court proceedings if it is not sought early in the case.[20]

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[19] There is no occasion here to consider whether causes of action under federal laws that distinctly concern Indians (as distinguished from generally applicable causes of action such as that under 42 U.S.C. 1983) should be allowed to remain in tribal court.

[20] In our view, a defendant's opportunity to elect a federal forum in lieu of a tribal forum should not extend to cases in which federal jurisdiction would be based solely upon diversity of state citizenship. Cf. *Iowa Mut.*, 480 U.S. at 17-19. The rationale for jurisdiction in federal rather than *state* court where an in-state party may have an advantage over an out-of-state party in that court does not support removal from *tribal* court simply because the parties (Indian or non-Indian) happen to be from different States. Moreover, this Court has not suggested that the interests served by diversity removal are as significant as the interests served by removal based on a federal cause of action or the defendant's status as a federal officer. See *Tennessee* v. *Davis*, 100 U.S. 257, 266-267 (1880) (addressing importance of the two latter types of removal); see also 28 U.S.C. 1441(b), 1446(b); *United Steelworkers* v. *Bouligny, Inc.*, 382 U.S. 145, 148 & n.6 (1965) (limits on removal in diversity cases).

The procedure that we propose would reflect no disrespect of tribal courts. It would, rather, place tribal courts on an equal footing with state courts with respect to the adjudication of causes of action under federal law that are within the scope of their original jurisdiction but also within the concurrent original jurisdiction of the federal courts. See *El Paso*, 526 U.S. at 485 (observing that Price-Anderson Act's provisions for preemption and removal from state courts demonstrate that "[a]ny generalized sense of comity toward nonfederal courts is obviously displaced"). As this Court has recognized, tribal courts, like state courts, are competent to adjudicate questions of federal law. See, *e.g.*, *id.* at 485 n.7; *Santa Clara Pueblo*, 436 U.S. at 65. But tribal courts, like state courts, ordinarily have no special expertise with respect to those questions. Furthermore, given that a tribal court's rulings on federal jurisdictional issues (and potentially other federal issues) are subject to subsequent review in federal court (see p. 25 note 17, *supra*), a threshold injunction against tribal court proceedings may be significantly more efficient and not significantly more intrusive than remitting the defendant to full tribal-court adjudication in the first instance would be. See *El Paso*, 526 U.S. at 486 (noting "inefficiencies" that would be produced by "duplicative determinations" in tribal court and federal court regarding preemption under Price-Anderson Act).[21]

Of course, a tribal court plaintiff remains the master of his complaint. Thus, a tribal court plaintiff, like a state court plaintiff, may amend the complaint to eliminate federal

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[21] To be sure, as we explained in our brief amicus curiae in *El Paso* (at 25 n.13), the justification for displacing tribal courts upon the defendant's election in cases encompassed by the Price-Anderson Act is stronger than the justification for displacing tribal courts upon the defendant's election in federal question cases generally. Nevertheless, we believe that the clear policy, codified in 28 U.S.C. 1441, of affording the defendant in a case arising under federal law the opportunity to have the case heard in federal court supports the same approach in this setting.

claims, and thereby avoid adjudication of the entire case (including any pendent claims under tribal law) in federal court.[22]

It is uncertain how the parties to this case would respond to the availability of a mechanism, parallel to removal under 28 U.S.C. 1441(a), that would enable the case, as currently pleaded, to be tried in federal court rather than tribal court. If this Court recognizes such a mechanism, and if petitioners elect to invoke it, they should first be required to notify the tribal court of their intention to do so. Such an approach would exhibit an appropriate deference to the tribal court, which could elect to stay its own hand pending the plaintiff's refiling of the case in federal court. It would also afford the plaintiff an opportunity to amend the complaint to eliminate any federal causes of action before the commencement of a federal injunctive action, thereby sparing all parties the

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[22] If a suit were to be brought in tribal court against federal officials in their personal capacities, several other statutory provisions would be relevant. First, the exclusive remedy for common-law torts committed by federal officers or employees within the scope of their office or employment is a Federal Tort Claims Act suit against the United States in federal district court. 28 U.S.C. 2679(b). Such cases may be removed from state to federal court upon certification by the Attorney General. See 28 U.S.C. 2679(d)(2); p. 21 note 14, *supra* (discussing Westfall Act). A tribal court, like a state court, is thus precluded, as a matter of controlling federal law, from providing any alternative remedy. Second, in addition to the right of all defendants to remove a case from state court to federal court based on the existence of a federal cause of action, a federal officer also has a right to remove a case (even one not arising under federal law) based on his status as such, as long as the officer asserts a colorable immunity or other federal defense. 28 U.S.C. 1442 (1994 & Supp. IV 1998); *Mesa* v. *California*, 489 U.S. 121 (1989). A federal officer therefore should be entitled to obtain an injunction against tribal court proceedings based on the assertion of such a defense. Finally, because of the status of the Tribes as dependent sovereigns within the federal system, additional considerations may apply to the exercise of tribal court jurisdiction over federal officers even when sued in their personal capacities. We thus do not foresee any circumstances in which a plaintiff could plead a cause of action in tribal court against a federal officer for acts within the scope of his office that could not be enjoined by a federal court.

unnecessary costs of filing and responding to an action in federal court.[23] Accordingly, while the mechanism that we propose could ultimately provide petitioners with a substantial measure of the relief that they sought in the district court if they choose to invoke it, we do not believe that approval of that mechanism by the Court here would require an alteration of the judgment below, which simply defers to the tribal court's initial exercise of jurisdiction in the current posture of the case.

CONCLUSION

The judgment of the court of appeals should be affirmed, without prejudice to petitioners' timely invocation of the procedure discussed in Part III of this brief.

Respectfully submitted.

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[23] No similar justification existed in *El Paso* for allowing the tribal court plaintiffs an opportunity to replead their claims. Claims asserting liability for a "nuclear incident," even if pleaded under state law, are deemed to be federal claims under the Price-Anderson Act. See 562 U.S. at 477, 484.